



**Comptroller General  
of the United States**

Washington, D.C. 20548

# Decision

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**Matter of:** AT&T Corporation

**File:** B-260447.4

**Date:** March 4, 1996

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## DIGEST

1. A definitive responsibility criterion is a specific and objective standard, qualitative or quantitative, that is established by a contracting agency in a solicitation to measure an offeror's ability to perform a contract. Further, in order to be a definitive responsibility criterion, the solicitation provision must reasonably inform offerors that they must demonstrate compliance with the standard as a precondition to receiving award.
2. A selection decision by a contracting agency is not automatically voided because of an allegedly inadequate contemporaneous evaluation record. In reviewing a selection decision, the General Accounting Office looks at the entire record, including statements and arguments made in response to a protest, so that we can determine whether the selection decision is supportable; we do not limit our review to the question of whether the agency determination was properly documented at the time it was made.
3. Where selection officials reasonably regard proposals as being essentially equal technically, cost may become the determinative factor in making an award

notwithstanding that the evaluation criteria assigned cost less importance than technical considerations.

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## **DECISION**

AT&T Corporation protests the award of a contract to Comsat RSI, Inc. under request for proposals (RFP) No. DCA200-94-R-0067, issued by the Defense Information Systems Agency (DISA) for the Commercial Satellite Communications Initiative (CSCI) network. The protester principally argues that Comsat failed to meet a definitive responsibility criterion established by the solicitation; that the agency improperly permitted Comsat to gain an unfair competitive advantage due to an organizational conflict of interest; that Comsat violated Federal Communications Commission (FCC) orders; and that the agency's "best value" determination was arbitrary and unsupported.

We deny the protest.

## **BACKGROUND**

This requirement is to enable DISA to obtain domestic and international C- and Ku-band satellite transponder leases and bandwidth management and control services for a global CSCI network, as well as systems engineering and international negotiating services.<sup>1</sup> The RFP was issued on August 19, 1994, and contemplated an indefinite quantity/indefinite delivery (IDIQ) contract with fixed unit prices except for a small labor-hour portion of the requirements. Because of certain technical specifications and the global coverage requirements, each offeror was obligated to

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<sup>1</sup>A transponder is essentially a satellite-based electronic device that receives electronic signals from a point on the ground and relays those signals back to earth. Typically, satellite transponders receive very "narrow" signals and relay back to earth "large-footprint" signals covering a broad geographic area. Bandwidth management services involve managing and monitoring the transponder leased by the agency. Systems engineering involves supporting the agency with evolving CSCI requirements and needs assessments. Finally, the successful contractor may be required to represent the agency with foreign countries for landing and operating rights for transponder signals within those countries.

propose INTELSAT transponders only available through Comsat World Systems, Inc.<sup>2</sup> for at least a portion of this requirement.

The RFP provided that award would be made to the offeror whose proposal was determined to be the most advantageous to the government. The RFP stated that three general areas would be evaluated: technical, management, and price. The RFP also stated that the technical area was substantially more important than the management area. The RFP provided that if technical/management proposals were deemed to be substantially equal, total price was to be "a major factor in selection of a proposal for award." Conversely, the RFP stated that where there was a significant difference in technical/management proposals, overall price to the government would be considered, but would not be a major factor in making a determination as to which proposal offered the greatest value to the government. The agency, in evaluating the technical area, considered the following three elements: (1) bandwidth management center operations; (2) surge support; and (3) CSCI life-cycle planning. The evaluation of the management area also focused on three elements: (1) contract management; (2) organizational structure; and (3) past experience and performance. As to price, the RFP stated that price evaluation was to be based on discounted life-cycle costs (DLCC) assuming that all options would be exercised.

On January 31, 1995, the agency received timely proposals from four offerors, including AT&T and Comsat. The agency conducted discussions and received best and final offers (BAFO) with the following evaluation results:<sup>3</sup>

<u>Offeror</u>	<u>Technical/Management</u>	<u>Price</u>
Comsat	87	\$423 million
AT&T	[deleted]	[deleted]

Based on the evaluation results, and as discussed below, the agency concluded that both proposals [deleted] and that the proposals of Comsat and AT&T [deleted].

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<sup>2</sup>According to the protester, Comsat World is a sister entity to the awardee, both of which are wholly owned by Comsat Corporation. The protester states that because of these relationships, the FCC has imposed stringent restrictions ("structural separation" orders) on Comsat World's dealings with third parties, including its dealings with its sister entities such as the awardee. We discuss the protester's contentions concerning this matter below.

<sup>3</sup>We will only discuss the proposals of AT&T and Comsat since the agency's final selection decision was between the proposals of these two offerors.

Since Comsat offered [deleted], the agency selected its proposal as offering the best value to the government and awarded the contract to that firm. This protest to our Office by AT&T followed an agency-level protest to DISA, which was denied by that agency.

## DEFINITIVE RESPONSIBILITY CRITERIA

The protester argues that Comsat failed to hold an FCC license (known as a "section 214 license") for this requirement prior to award and that Comsat was therefore ineligible for award.<sup>4</sup> This argument is premised on the assumption that the following provisions in the RFP established a definitive responsibility criterion and thus required Comsat to have such a license prior to award:

"Source Selection Evaluation Criteria

a. The following conditions must be met in order to be eligible for award: (1) The proposal must comply in all material respects with the requirements of law, regulation, and conditions set forth in the solicitation.

. . . . .

"[Facilities and services under the contract shall be] in accordance with . . . [a]ll applicable tariffs, rates, charges, rules, regulations, or requirements [of the FCC]."

"[C.]3.1 Prerequisites

[C.]3.1.1 The Contractor shall be a U.S. entity subject to the Communications Act of 1934, as amended, or an International

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<sup>4</sup>The protester argues that Comsat did not seek or receive prior to award a section 214 license from the FCC to resell INTELSAT satellite transponder services. According to the protester, Comsat was the only offeror that did not have an FCC license prior to the award date. The protester also argues that because of the critical and vital nature of this CSCI contract, it was imperative that an offeror, including common and non-common carriers, already hold the FCC license to preclude the "possibility that FCC restrictions might [prevent] issuance of a license or impose conditions on performance of the services required by the CSCI contract." The record shows that Comsat applied for and secured a section 214 license from the FCC after award in sufficient time to permit performance of the contract on schedule.

Consortium with a U.S. member subject to the Communications Act of 1934."<sup>5</sup>

We need not consider the specifics of the protester's arguments concerning Comsat's alleged failure to meet these provisions because we find that none of these provisions, individually or collectively, establishes a definitive responsibility criterion.

A definitive responsibility criterion is a specific and objective standard, qualitative or quantitative, that is established by a contracting agency in a solicitation to measure an offeror's ability to perform a contract. In order to be a definitive responsibility criterion, the solicitation provision must reasonably inform offerors that they must demonstrate compliance with the standard as a precondition to receiving award. See generally Data Gen. Corp., B-252239, June 14, 1993, 93-1 CPD ¶ 457.

Here, the provisions cited by the protester are not, in our view, sufficiently specific to establish a definitive responsibility criterion; rather, the provisions essentially require in general terms that each offeror "comply [with] law [and] regulation" and conform with unspecified and unidentified "applicable" tariffs, rules, and regulations. Further, the provisions do not in any way reasonably inform offerors that the RFP imposes on offerors mandatory compliance with a specifically identified license (such as the section 214 FCC license) as a definite precondition for award. See GE Am. Communications, Inc., B-240385, Nov. 16, 1990, 90-2 CPD ¶ 398.<sup>6</sup> Rather, as the agency and the interested party argue, these provisions concern the general responsibility of the awardee (its ability to obtain all necessary and applicable licenses) and its ability to perform the contract consistent with all legal

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<sup>5</sup>This provision appeared as a "Prerequisite" in the RFP's statement of work. The agency correctly points out that section C.3.1. lists other "prerequisites" that, in fact, can only be satisfied after award. For example, provision C.3.1.3 requires that the contractor "shall permit the DISA to allocate leased satellite transponder power and bandwidth at the DISA's discretion." It is undisputed that this requirement can only be satisfied post-award, despite its inclusion under the title "Prerequisite."

<sup>6</sup>The agency points out that AT&T, in the license proceedings before the FCC, specifically brought this matter to the attention of the FCC. AT&T stated to the FCC that "[w]hen DOD [Department of Defense] does not have the jurisdiction to effectuate communications policy or the expertise to evaluate the structural separation and other requirements placed on Comsat, the FCC must ensure that such a substantial government contract award does not violate its regulations or otherwise obstruct FCC policies." Based on the information before the FCC, that agency found that AT&T's allegations were unsupported.

requirements. See id. The agency found Comsat to be a responsible contractor. We do not review an agency's affirmative determination of a firm's responsibility under the circumstances here. See 4 C.F.R. § 21.3(m)(5) (1995). Accordingly, this protest ground is denied.<sup>7</sup>

#### ALLEGED UNFAIR COMPETITIVE ADVANTAGE

The protester argues that the "United States Government" granted Comsat World a monopoly for the provision of INTELSAT services, an important part of this requirement, and that Comsat World therefore effectively was a subcontractor to every offeror in the procurement, which allegedly created an organizational conflict of interest between Comsat World and offeror Comsat.<sup>8</sup> The protester argues that "it is immaterial that [DOD] did not itself grant [Comsat World] its monopoly status over INTELSAT services [because] the federal government as a whole is clearly responsible when any agency or department of the government creates such an organizational conflict of interest that affords an offeror in a given procurement an unfair competitive advantage." The only evidence the protester presents to support

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<sup>7</sup>AT&T also alleged in its initial protest that Comsat World may have improperly disclosed AT&T proprietary data to Comsat in violation of these structural separation orders. In its comments, AT&T abandoned this protest ground. In this protest and in the post-award FCC proceedings relating to Comsat's section 214 application, AT&T argued that Comsat and Comsat World Systems, Inc. violated the "structural separation" orders imposed by the FCC. Briefly, the structural separation restrictions imposed by the FCC require Comsat to maintain a separate organizational structure from Comsat World with separate officers and personnel; restrict certain cost allocations by Comsat World; and restrict the flow of information between Comsat World and Comsat such that any information made available to Comsat entities would also have to be made immediately available to the public. The protester contends that the agency failed to consider during the procurement whether Comsat violated these structural separation orders imposed by the FCC. We also view these allegations as relating to the awardee's compliance with all laws and regulations which the contracting officer is required to consider generally as part of his responsibility determination. See Federal Acquisition Regulation § 9.104-1(g).

<sup>8</sup>The protester does not argue that this alleged organizational conflict of interest should have precluded Comsat from competing in this procurement. Rather, AT&T argues that Comsat's "participation [in this procurement] made it critical for [the agency] to conduct the source selection in accordance with the evaluation criteria and other terms of the solicitation and applicable law and regulation, paying due regard to the highly sensitive nature of the relationship between [Comsat and Comsat World]."

its position that Comsat enjoyed an unfair competitive advantage is that Comsat, in its proposal, "tout[ed] the experience [and] resources of Comsat World to secure an evaluation advantage."<sup>9</sup> According to the protester, Comsat essentially "cast" Comsat World as a member of its team for evaluation purposes, and the agency failed "to police and avoid, mitigate, or neutralize" Comsat's alleged advantage, independent of whether or not Comsat was also in violation of the FCC's structural separation orders and requirements.

The agency responds that Comsat World was a required subcontractor because its satellite transponder services were the only ones available in certain areas of the world. The agency also states that AT&T has not demonstrated that these subcontract services from Comsat World were not equally available at the same rates to all prospective prime contractors competing for the CSCI contract.

The fact that a firm or organization may enjoy a competitive advantage provides no basis for objection so long as that advantage is not the result of preferential or unfair action by the agency. See Richard M. Milburn High Sch., B-249286, Oct. 30, 1992, 92-2 CPD ¶ 308. We do not see that any unfair competitive advantage exists or that any unfair agency action occurred. As AT&T acknowledges, Comsat World is a regulated carrier that is required to "deal with other Comsat entities purely on an arms-length basis" and is "required by law to be an honest broker and provide the required services on an equal basis to all offerors." As we understand it, under FCC orders, Comsat World is obligated to avoid conferring a competitive advantage on any vendor proposing under this solicitation. Thus, the FCC has acted to ensure that Comsat does not have a competitive advantage over other offerors. Further, in our view, the weight to be given the awardee's references to Comsat World's resources was a matter of evaluation for the agency. The RFP did not prohibit references in proposals by any offeror such as Comsat to the resources and experience of sister companies. There is no showing that the agency misevaluated the information.

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<sup>9</sup>The protester states that Comsat, in its proposal, relied on its corporate affiliation with Comsat World; referred to itself and its proposal "team" generically as "Comsat" and, in particular, as being the signatory to INTELSAT; stated that it had "30 years of experience" which allegedly could only refer to Comsat World's experience; and also stated that it "can draw upon more than 1,000 engineers," which the protester states could only come from Comsat World. Comsat challenges some of these allegations, stating that the 1,000 engineers can easily be obtained from other Comsat team members, such as Lockheed Martin and TRW. Comsat also alleges that the 30 years of experience comes from Comsat and Comsat Laboratories, which evolved from various Comsat nonregulated entities that have existed for 30 years. Also, Comsat states that the key personnel it proposed have up to 30 years experience upon which Comsat may rely.

## AGENCY BEST VALUE DETERMINATION

The protester advances detailed arguments that the agency failed to conduct a rational "best value" analysis and price/technical tradeoff in selecting Comsat to be the successful offeror. AT&T contends that: (1) the agency relied solely on numerical scores in making its determination that Comsat and AT&T [deleted] from a technical/management standpoint;<sup>10</sup> (2) the agency did not conduct a "true cost/technical tradeoff" because it failed to assess even the most obvious "unquantifiable" and "readily quantifiable" technical discriminators, such as satellite transponder performance differences, which, if properly evaluated, would have eliminated any overall [deleted] advantage that Comsat allegedly enjoyed;<sup>11</sup> and (3) the agency, even if it properly determined the two proposals to be essentially equal, was not permitted by the RFP to then treat price as "dispositive," but only as a "major factor."

An agency does not have to find two proposals strictly equal from a technical standpoint in order to determine them essentially equal; our Office has upheld such determinations where there were technical differentials of more than 15 percent. See Ogilvy, Adams & Rinehart, B-246172.2, Apr. 1, 1992, 92-1 CPD ¶ 332. Except for its arguments that the agency should have evaluated quantifiable and non-quantifiable proposal discriminators, which we discuss below, the protester has not directly challenged the substantive technical merits of Comsat's proposal. Rather, AT&T argues that the agency relied on bare numerical scores in determining that Comsat's proposal was [deleted] to AT&T's.

Our review of the record does show that the contemporaneous narrative evaluation documents are summary in fashion. For example, the final technical proposal evaluation briefing by the evaluators compares, in summary form, the strengths and

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<sup>10</sup>The protester states that the evaluators based their recommendation to the source selection authority (SSA) on the following determination: "It is hereby determined that total scores of [deleted]. The protester also states that the SSA, in his source selection decision, also relied on the premise that the point scores were [deleted]."

<sup>11</sup>The protester argues that certain portions of the agency's source selection plan (SSP) required the agency to determine the "net value" of each proposal based on "quantified" and "non-quantified" discriminators. The agency disputes that its evaluation was not consistent with the SSP. We merely note that the protester has not identified any RFP provision that the agency allegedly violated by not evaluating "quantified" and "non-quantified" technical discriminators. We also note that the SSP is an internal agency guide which, if not incorporated or referenced in the RFP, the agency is not required by law to follow. See Pan Am World Servs., Inc., B-235976, Sept. 28, 1989, 89-2 CPD ¶ 283.



weaknesses of Comsat and AT&T. Comsat is found to have strengths in "pre-existing SATCOM infrastructure," in having two transportable bandwidth management centers (BMC) (of a total of five BMCs), in proposing to keep a database of all available satellites, and in planning to interface information control into the BMCs. AT&T, for example, in this same summary by the evaluators, was found to have strengths in having more than [deleted], in having a [deleted], in having [deleted], and in having exceptional [deleted]. Weaknesses of both offerors' proposals were also noted. Except for a more detailed narrative discussion and explanation of the BMCs of the competing offerors, the agency's overall contemporaneous narrative explanation is not extensive.

Nevertheless, even though the contemporaneous narrative could have been more detailed, we cannot say, based on our review of the record, that the SSA did not have sufficient information (including the scoring and the basic technical strengths and weaknesses of both offerors) on which to conclude that the two proposals [deleted]. In reviewing a selection decision, we look to the entire record, including statements and arguments made in response to a protest, so that we can determine whether the selection decision is supportable; we do not limit our review to the question of whether the agency determination was properly documented at the time it was made. See Burnside-Ott Aviation Training Ctr., Inc.; Reflectone Training Sys., Inc., B-233113; B-233113.2, Feb. 15, 1989, 89-1 CPD ¶ 158.

In the agency report, DISA presented extensive and detailed narrative concerning examples of the strengths of Comsat's technical and management proposals, at the factor and subfactor level. This information is consistent with the less detailed contemporaneous documentation. We need not repeat the details here except to say that the agency has presented sufficient detail to show that Comsat deserved the scores it received. More importantly, the protester has not attempted to rebut any of these narrative statements in the agency report or contest the agency's substantive technical conclusions as to the Comsat proposal's strengths.

In this regard, the protester only asserts with respect to its own technical evaluation that the agency failed to consider certain technical discriminators. The protester argues, for example, that there are significant differences in proposed [deleted], and, in turn, the [deleted] to meet its needs under a given offeror's proposed solution. The protester argues that INTELSAT satellite transponders proposed by Comsat are lower performance models than those proposed by AT&T, "and analysis of this discriminator alone would have closed the apparent price gap between the two proposals."

Apparently, the protester is arguing that certain technical features of its equipment as contained in its technical proposal should have been quantified into monetary terms by the agency and factored into the price evaluation. We point out that there was no provision in the evaluation criteria for the "quantification" of the relative

merit of transponder technical characteristics or other technical considerations. In the absence of an evaluation criterion providing for quantifying the technical advantage of proposed equipment, we do not think the agency acted improperly in not conducting such an evaluation. See Sci-Tec Gauging, Inc.; Sarasota Measurements & Controls, Inc., B-252406, B-252406.2, June 25, 1993, 93-1 CPD ¶ 494 (agency may not evaluate based on unstated criteria).

Since the protester has not shown that these technical features warranted a finding of technical superiority under the solicitation terms, we have no basis to disturb the agency's determination that the two proposals were [deleted].

Finally, the protester's argument that the agency was not permitted to treat price as dispositive--as opposed to, in the RFP's terms, a "major factor" [deleted] is denied. Where selection officials reasonably regard proposals as being [deleted], cost may become the determinative factor in making an award even where that the evaluation criteria assigned cost less importance than technical considerations. Ogilvy, Adams & Rinehart, *supra*.

#### SUPPLEMENTAL PROTEST ISSUES

In a supplemental protest, AT&T argues that Comsat failed to comply with a mandatory minimum requirement to provide an "entire transponder" under contract line item number (CLIN) No. 5 (instead, according to AT&T, Comsat offered only ".5 of a whole transponder [in its tariff]"). We find no merit to this allegation. First, the record shows that Comsat's proposal quoted a quantity of "1" transponder for each lease option that it priced for CLIN No. 5 in section B of the RFP. Nowhere in Comsat's initial or final proposals was there a reference to a ".5" of a transponder. Second, the agency's discussion question that it issued to Comsat shows that the agency understood that Comsat's pricing for CLIN No. 5 (a fixed monetary sum) was "for a 72 MHz transponder priced on a domestic half segment basis." AT&T [deleted]. Finally, the protester bases its allegation that Comsat offered only ".5 of a transponder" on a tariff filing Comsat submitted to the FCC after award of the contract. Since the protester has failed to show that Comsat qualified its obligation in its proposal to provide an entire transponder for CLIN No. 5, we deny this protest ground.

AT&T also argues that the agency failed to upwardly adjust Comsat's price by \$7 million and misevaluated its price proposal to the extent of \$19 million. Comsat argues that the latter contention by AT&T is untimely. We simply note that these allegations, even if we assume them to be true, would not in any way displace Comsat as the low offeror which, ultimately, was the reason Comsat was selected.

The protest is denied.

Comptroller General  
of the United States